SUPREME COURT, U. S.

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IN THE

# Supreme Court of the United States

**October Term, 1968**

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## No. 638

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CO-OPERATIVE LEGISLATIVE COMMITTEE, RAILROAD BROTHERHOODS IN THE STATE OF PENNSYLVANIA,

*Petitioner,*

v.

BESSEMER and LAKE ERIE RAILROAD COMPANY, *et al.*,

*Respondents.*

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**PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA**

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*To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:*

Petitioner, Co-Operative Legislative Committee, Railroad Brotherhoods in the State of Pennsylvania, respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Pennsylvania in the above cause. Co-Operative Legislative Committee, Railroad Brotherhoods in the State of Pennsylvania, was an intervenor before the Superior and Supreme Courts of the Commonwealth of Pennsylvania. The Co-Operative Legislative Committee joins in the Petition for a Writ of Certiorari heretofore filed on August 26, 1968 at Number 443

October Term, by the Pennsylvania Public Utility Commission, relies on the record therein and files this Petition on its own behalf.

## Opinions of the Courts Below

The opinion of the Superior Court of Pennsylvania is reported at 210 Pa. Superior Ct. 7, 232 A. 2d 220 (1967) and is printed in full in the Supplemental Appendix to the Pennsylvania Public Utility Commission Petition as Appendix V, to which reference is made.

The opinion of the Supreme Court of Pennsylvania is reported at 430 Pa. 339, 243 A. 2d 358 (1968) and is printed in full in Appendix I to the Petition of the Pennsylvania Public Utility Commission, as is the order of the Supreme Court of Pennsylvania denying the petition for reargument as Appendix II. To both of these Appendices reference is made.

## Jurisdiction

The judgment of the Supreme Court of Pennsylvania was entered on May 21, 1968. The order of the Supreme Court of Pennsylvania denying the petition of Pennsylvania Public Utility Commission for rehearing was entered on July 15, 1968.

The jurisdiction of this Court is invoked under 28 U. S. C. 1257(3).

## Question Presented for Review

Did the Supreme Court of Pennsylvania err in holding that Section 25 of the Interstate Commerce Act, 49 U. S. C. Section 26, dealing with the installation of block signal

systems completely occupied the field and pre-empted all state regulation dealing with flag protection?

## Statutes Involved

Section 25, Part I of the Interstate Commerce Act, as amended, 49 U. S. C. § 26 (printed at length in the Petition of the Pennsylvania Public Utility Commission in Appendix III, to which reference is made).

Sections 401, 413, 901, 902 of the Public Utility Code, 66 Purdon's Stat. Ann. §§ 1171, 1183, 1341, 1342, Act of May 28, 1937, P. L. 1053 (printed at length in the Petition of the Pennsylvania Public Utility Commission in Appendix IV, to which reference is made).

## Statement of the Case

For almost 100 years the railroads in the United States had included within their operating rules an almost standard provision known as Rule 99, which provided that a member of the crew must go back immediately with proper flagging equipment a sufficient distance to insure full protection when a train stops under circumstances in which it may be overtaken by another train.

In the year 1964, and in the years immediately prior thereto, the railroads within the Commonwealth of Pennsylvania began to make exceptions to this general rule in their operating rules, which exceptions were generally calculated to eliminate the requirement of full flag protection when trains were operating under locomotive cab, automatic block or manual block signal system rules.[1]

[1] Automatic block signals at fixed installations along the track give an indication of track conditions in the block or blocks ahead as a result of which engineers must stop or regulate their speed to conform to certain operating standards; locomotive cab signals give such indication continuously on a panel within the locomotive cab; manual block systems are controlled by operators at one or both ends of the block who advise engineers of conditions within the block.

The employees on the railroads of Pennsylvania, as indeed the employees on the railroads in many other states, were justifiably concerned that such changes to the long-established Rule 99 increased the risk of death or injury while they were in the performance of their duties. Consequently, in 1964 they brought the actions which culminated in an order by the Pennsylvania Public Utility Commission dated December 19, 1966, requiring that when a train stops under circumstances in which it may be overtaken by another train, a member of the crew must provide flagging protection, that is, go back immediately with a red flag, torpedoes and fusees by day and with a red and/or white light, torpedoes and fusees by night, a sufficient distance to insure full protection, placing two torpedoes on the rail, and when necessary, in addition, display lighted fusees.[2]

This order was applicable to all of the railroads operating within the Commonwealth of Pennsylvania. It was sustained by the Pennsylvania Superior Court unanimously, both on the merits and on the question of federal pre-emption. The railroads of the Commonwealth then petitioned the Pennsylvania Supreme Court for review, which review was granted, but limited solely to the question of federal pre-emption, a question decided adversely to the railroads when raised by them in the Superior Court. The Pennsylvania Supreme Court on May 21, 1968 reversed both the orders of the Superior Court and the Pennsylvania Public Utility Commission on the ground that state jurisdiction had been completely pre-empted by Section 25 of the Interstate Commerce Act, 49 U. S. C. § 26, popularly known as the Railroad Block Signal System Act. The Co-Operative Legislative Committee, Railroad Brotherhoods

[2] This order is reproduced in full as Appendix VI to the Pa. P. U. C.'s Petition and found in the Supplemental Appendix at page 135.

in the State of Pennsylvania, was permitted to intervene by the Pennsylvania Superior Court and remained a party throughout the proceedings before the Supreme Court, which proceedings included the denial of the Petition for Reargument by the Supreme Court on July 15, 1968.

It is to be noted that no argument was made by the railroads that the order of the Pennsylvania Public Utility Commission, which had the effect of reinstituting the flagging rule within the Commonwealth, interfered with or was a burden upon interstate commerce. The record indicates that the reinstitution of the rule would have no economic impact upon the railroads nor did it require the employment of any additional personnel.[3]

The position of the employees throughout has been that manual flagging contributed to increased safety, both within and without manual block signal, automatic block signal, centralized traffic control or locomotive cab signal territories. They introduced evidence to the effect that, although much effort has been expended toward construction of automatic devices in such a manner that they "fail-safe",[4] false proceed indications occur at indefinite and indeterminate times. Indeed, the employees were and are so concerned for their own safety that they are willing to undertake the additional effort and responsibility required in performing manual flagging for their own safety and that of the public.

The railroads, in reply to the employees' contentions, argued primarily that the flagging requirements divided the responsibility for avoiding rear-end collisions between

[3] See Opinion of Pennsylvania Superior Court, Supplemental Appendix to Pa. P. U. C. Petition, page 92.

[4] "Fail-safe" refers to the indication by a signal of a more restrictive aspect in case of mechanical failure. "False proceed" refers to a failure resulting in a less restrictive aspect.

the flagman and the following engineer and reliance on flagmen lulls engineers into a false sense of security and thus creates a safety hazard. The railroads' contention that the elimination of flagging would result in safer operation was rejected by the Pennsylvania Public Utility Commission, and the Pennsylvania Superior Court found that it was legally justified in such rejection.

The Pennsylvania Public Utility Commission has filed a Petition for a Writ of Certiorari to the Supreme Court of Pennsylvania, and the Co-Operative Legislative Committee, Railroad Brotherhoods in the State of Pennsylvania, joins in such Petition. In order to minimize duplication, the Brotherhoods will not reiterate all of the facts and arguments set forth by the Pennsylvania Public Utility Commission in its Petition, but they accept and adopt them as their own.

## The Reason for Allowing Certiorari

The Supreme Court of Pennsylvania has decided that the Congress of the United States by the enactment of Section 25 of the Interstate Commerce Act, effectively precluded state regulation requiring manual flag protection of trains against following movements on the basis that the mechanical devices specifically required by Section 25 perform the exact same function that manual flagging is intended to perform and that the language used in Section 25 must be construed to indicate that Congress has chosen to occupy the entire field to the exclusion of all state regulation.

This decision is directly contrary to the decision of the Supreme Court of New Jersey in *Pennsylvania Railroad Company et al. v. Board of Public Utility Commissioners*,

*et al.*, 49 N. J. 174, 229 At. 2d 505, made on April 24, 1967 in an identical situation.[5]

Not only are the Supreme Courts of these two states diametrically opposed on the question involved herein, but the decision of the Supreme Court of Pennsylvania, if followed, would exclude state regulation of a field which the federal government has not seen fit to occupy.

Federal railroad safety regulations until April 1, 1967 were administered by the Interstate Commerce Commission and on that date became the responsibility of the Department of Transportation, Federal Railroad Administration. It is free from doubt that neither the Interstate Commerce Commission nor the Federal Railroad Administration believed, nor do they now believe, that they possess any statutory authority or obligation to enter the field. It is also abundantly clear that no regulations requiring flagging have been promulgated by the federal government.[6]

To allow the decision of the Pennsylvania Supreme Court to stand would deprive the states of jurisdiction in a field which Pennsylvania, Illinois, Maryland, Delaware and West Virginia have felt a need to enter. It would deprive the states of any jurisdiction to provide regulation in an industry which is extremely hazardous regardless of the emphasis placed on safety. It is an occupation where 166 employees were killed and 17,529 employees were injured in 1967. The decision of the Pennsylvania Supreme Court by a bare majority must not be allowed to become the basis for a lack of regulation leading to future injury and death. It is not in accordance with the deci-

[5] This Opinion is reproduced in Appendix I of this Petition.

[6] Letters from the Interstate Commerce Commission and the Department of Transportation so indicating are printed in this Petition as Appendices II and III.

sions of your Honorable Court dealing with the question of pre-emption and if allowed to continue as the law of Pennsylvania will create a permanent vacuum by excluding state authority in a field of safety in which the federal government has not as yet seen fit to act. It will result in unreasonable and unnecessary hazard, not only to railroad employees, but to the public generally. It is clearly erroneous and should be reversed.

## ARGUMENT

**Congress, in enacting Section 25 of the Interstate Commerce Act, did not preclude state regulation requiring protection of trains against following train movements for the reasons: Congress did not manifest an intention to do so; the state regulation does not, in its terms or in its administration, conflict with Section 25 or infringe upon its policy; and there is no sound basis under applicable principles to infer pre-emption.**

It is not disputed that the state regulation on flagging does not contravene the commerce clause of the Federal Constitution and that it is not in conflict with any Federal Act or regulation. The issue, to which the Supreme Court of Pennsylvania limited its review, is whether Section 25 of the Interstate Commerce Act,[7] pre-empted state regulation dealing with flag protection.

The Court below, by a 4-3 divided opinion, held pre-emption by inference and gave three reasons in support of its finding:

> "First, there can be no doubt whatsoever that the mechanical devices specifically required by § 25 perform the *exact same function* that manual flagging is intended to perform (*i.e.*, increasing safety by prevent-

[7] 49 U. S. C. § 26.

> ing rear end collisions); second, the language used in § 25 is broad enough to indicate that Congress has chosen to regulate the entire field of rear end collision prevention; and third, the Supreme Court of the United States has announced the rule that where federal language is broad enough to indicate pre-emption, a state law cannot escape interdiction on the ground that it does not *conflict* with the federal regulations actually passed." (Pa. P. U. C. Petition Appendix I, page 48)

The Pennsylvania Supreme Court did not find any conflict between the federal act and the state regulation. It based its ruling on finding an intention on the part of Congress to occupy the entire field. The constitutional rule is, absent a conflict, that there must be a *clear manifestation of Congressional intention.* The distinction between "clear manifestation of intention' and the light, superficial inference indulged in by the Pennsylvania Supreme Court to find Congressional intent is obvious.

The Federal Statute is completely silent on the subject of flagging, so that a finding of pre-emption must be based on inference. But such inference can properly be made only by the satisfaction of certain basic tests.

The guiding principle for pre-emption by inference is well stated in *Southern Pacific Co. v. State of Arizona ex rel. Sullivan*, 325 U. S. 761, 766 (1945):

> "Congress, in enacting legislation within its constitutional authority over interstate commerce, will not be deemed to have intended to strike down a state statute designed to protect the health and safety of the public unless its purpose to do so is clearly manifested, . . . or unless the state law, in terms or in its practical administration, conflicts with the Act of Congress, or plainly and palpably infringes its policy."[8]

[8] The Southern Pacific case held, *inter alia*, that Section 25 of the Interstate Commerce Act, the same section as is here involved, did not pre-empt state regulation of train lengths.

To the same effect, although the thought is expressed in different words, is:

*Florida Lime and Avocado Growers Inc. v. Paul, Director of Dept. of Agriculture of California,* 373 U. S. 132, 142 (1963):

> ". . . The test of whether both federal and state regulations may operate, or the state regulation must give way, is whether both regulations can be enforced without impairing the federal superintendence of the field, not whether they are aimed at similar or different objectives.
>
> "The principle to be derived from our decisions is that federal regulation of a field of commerce should not be deemed pre-emptive of state regulatory power in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained."[9]

In another case, *Colorado Anti-Discrimination Commission v. Continental Air Lines, Inc.,* 372 U. S. 714, 772 *et seq.* (1963), the issue was the same as that here in that the carrier contended that, even without conflict, a state statute on the same subject as the federal statute was invalid. The Court rejected this contention, saying:

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[9] *Cf.* the Pennsylvania Supreme Court's reliance on block signals and flagging being intended to perform same objective, the prevention of rear end collisions, and see Buck v. California, 343 U. S. 99 (1952) reh. den. 343 U. S. 932, municipal ordinance and federal regulation on the same subject were allowed to stand together, in the words of the Court (page 102):

> "As the ordinance is not in conflict with and may be construed consistently with the federal regulations, and in keeping with the latter's purpose, they may stand together . . .".

And also see Huron Portland Cement Co. v. City of Detroit, 362 U. S. 440, 443 (1960):

> "In determining whether state regulation has been pre-empted by federal action, 'the intent to supersede the exercise by the state of its police power as to matters not covered by the Federal legislation is not to be inferred from the mere fact that Congress has seen fit to circumscribe its regulation and to occupy a limited field. In other words, such intent is not to be implied unless the act of Congress, fairly interpreted, is in actual conflict with the law of the state.'"

"Continental argues that federal law has so pervasively covered the field of protecting people in interstate commerce from racial discrimination that the States are barred from enacting legislation in this field. It is not contended, however, that the Colorado statute is in direct conflict with federal law, that it denies rights granted by Congress, or that it stands as an obstacle to the full effectiveness of a federal statute. Rather Continental argues that:

'When Congress has taken the particular subject-matter in hand, coincidence is as ineffective as opposition, and a state law is not to be declared a help because it attempts to go farther than Congress has seen fit to go.'

"But this Court has also said that the mere 'fact of identity does not mean the automatic invalidity of State measures.' To hold that a state statute identical in purpose with a federal statute is invalid under the Supremacy Clause, we must be able to conclude that the purpose of the federal statute would to some extent be frustrated by the state statute. We can reach no such conclusion here."

* * *

"The Civil Aeronautics Board and the Administrator of the Federal Aviation Agency have indeed broad authority over flight crews of air carriers, much of which has been exercised by regulations. Notwithstanding this broad authority, we are satisfied that Congress in the Civil Aeronautics Act of 1938 and its successor had no express or implied intent to bar state legislation in this field and that the Colorado statute, at least so long as any power the Civil Aeronautics Board may have remains 'dormant and unexercised,' will not frustrate any part of the purpose of the federal legislation."

The law as stated in all the above cases was applied by the Supreme Court of Illinois in a case where the preemptiveness of Section 25 of the Interstate Commerce Act was in question as in the instant case. The case reference

is *Central Illinois Public Service Co. v. Illinois Commerce Commission ex rel. Illinois Central Railroad Co.*, 18 Ill. 2d 506, 165 N. E. 2d 322 (1960). There the court rejected a contention that Congress, by virtue of Section 25, 49 U. S. C. § 26, had completely pre-empted the field of train-stop regulation; and found that the Illinois Commerce Commission, in requiring a conversion of the railroad's train-stop system from 60 cycle to 100 cycle current to immunize it from interference from current escaping from the Public Service Company's transmission line and causing false signals, was not invading a field completely pre-empted by Federal authority. The railroad in that case certainly was not making any contention of pre-emption. Indeed, it was the railroad's complaint to the Illinois Commerce Commission which instigated the litigation.[10]

The same guiding principle was applied by the New Jersey Supreme Court in *In Re Complaint of Brotherhood of R. R. Trainmen v. Public Utility Commissioners of New Jersey*, 49 N. J. 174, 229 A. 2d 505 (1967) on the exact issue here involved, namely, whether the state safety measure of flag protection was pre-empted by Section 25. The

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[10] Illinois Central Railroad said in its brief before the Supreme Court of Illinois, page 38:

"It is now well settled that the State of Illinois (as well as the other sovereign states) has the inherent power to enact reasonable regulations for the protection of the health, safety and general welfare of persons within the confines, provided (1) that such regulations do not directly burden interstate commerce and (2) that such regulations are not in conflict with or repugnant to any action taken by Congress, *even though such regulations incidentally affect interstate commerce.*"

And on page 46 of the same:

"It is difficult to imagine or to even conjure up a state order or regulation which would be less in conflict with or less repugnant to action taken by Congress or its agencies than is the order in the instant case. The fact of the matter is the Commission's order of March 8, 1955 is *in aid of* interstate commerce and *in aid of* action taken by the agencies of Congress, as will be hereinafter demonstrated."

And on page 51:

"In view of the language in the foregoing cases, it is respectfully submitted that Congress has not occupied the field of signal regulation to the exclusion of the states and that the order in question does not directly burden interstate commerce and is not in conflict with nor repugnant to any action taken by Congress or its agencies."

New Jersey Supreme Court found no pre-emption. The Pennsylvania Supreme Court in a somewhat cursory manner refuses to follow the decision of the New Jersey Supreme Court.

The Pennsylvania Court relies heavily on the case of *Napier v. Atlantic Coast Line R. R. Co.*, 272 U. S. 605 (1926), which construed the Locomotive Boiler Inspection Act[11] as clearly indicating an intention by Congress to occupy the entire field of regulatory locomotive equipment:

In *Napier*, at page 611 this Court said:

> "Does the legislation of Congress manifest the intention to occupy the entire field of regulating locomotive equipment? Obviously it did not do so by the Safety Appliance Act, since its requirements are specific. It did not do so by the original Boiler Inspection Act, since its provisions were limited to the boiler. *Atlantic Coast Line R. R. Co. v. Georgia*, 234 U. S. 280. But the power delegated to the Commission by the Boiler Inspection Act as amended is a general one. It extends to the design, the construction and the material of every part of the locomotive and tender and of all appurtenances.
>
> "'The requirements here in question are, in their nature, within the scope of the authority delegated to the Commission . . .'"

And at page 613:

> "We hold that state legislation is precluded, because the Boiler Inspection Act, as we construe it, was intended to occupy this field. The broad scope of the authority conferred upon the Commission leads to that conclusion. Because the standard set by the Commission must prevail, requirements by the States are precluded, however commendable or however different their purpose."

[11] 45 U. S. C. § 23, printed in Appendix IV hereto.

The New Jersey Supreme Court distinguishes this case by reference to the obvious need for national uniformity in the field of locomotive equipment.

A more cogent argument is thought to reside in the words of the Statute itself. The Boiler Inspection Act was extended in 1915 to include "the entire locomotive and tender and all parts and appurtenances thereof." It is all embracing and obviously indicates an intent to subject the entire locomotive and all its parts to federal regulation. Numerous regulations have actually been issued.

In contrast the Railroad Block Signal Act[12] refers to "block signal system, interlocking, automatic train stop, train control, and/or cab signal systems and/or other *similar*[13] appliances, methods or systems, intended to promote the safety of railroad operation." This Statute can only be construed as embracing manual flagging by following the tortuous and erroneous reasoning of the Pennsylvania Supreme Court.

The Pennsylvania Court first characterizes this statute as intended to prevent rear-end collisions rather than being intended to control the installation, inspection, maintenance and repair of block signal systems, interlocking devices, automatic train stops, train control, cab signal devices and *similar* appliances, methods or systems.

Not only does the use of the word "similar" argue against such construction, but also the legislative history[14] and any reasonable construction of the Act itself.

As Justices Cohen and Eagen said in their dissent, the statute uses the language "to install . . . upon the whole

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[12] So entitled in Popular Name Tables.

[13] Italics ours.

[14] Reference is made to the Petition of the Pa. P. U. C. on this point, wherein at page 20 the legislative history is discussed.

or any part of its railroad."[15] Certainly a statute intended to cover all rear-end collisions would not be so geographically limited nor would an act intended to cover manual flagging use the word "install".

Likewise an Act intended to prevent rear-end collisions by any means including manual flagging would not require the inspection of such "apparatus, with its controlling and operating appurtenances" from time to time as does the Block Signal Act in its paragraph (e).[16]

When consideration is given to the consequences which would result from the decision of the Pennsylvania Supreme Court were it not reversed, it becomes all the more clear that the Pennsylvania Supreme Court has stretched inference to a point beyond that permitted by the applicable criteria, and would thereby create a vacuum wherein no state regulation would be lawful and no federal regulation has been authorized by Congress.

The inherent police power of the state must not lightly be brushed aside to leave a vacuum in which the public and the railroad employees are afforded no protection by either federal or state law. There is an abundance of precedent for this conclusion, and reference need only be made to 15 Am. Jur. 2d, Commerce Sec. 24, where it is said:

> "While it is agreed that the exercise of the state's police power must yield when it comes in conflict with an affirmative exercise by Congress of its power to regulate commerce, the intention of Congress to exercise its paramount authority to supersede or exclude state action is not lightly to be inferred, especially where the public safety and health are concerned."

[15] See Pa. P. U. C. Appendix III, p. 73.

[16] See Pa. P. U. C. Appendix III, p. 76.

In support of making its inference of pre-emption the Pennsylvania Supreme Court says that "there can be no doubt whatsoever that the mechanical devices specifically required by section 25 perform the *exact same function* that manual flagging is intended to perform (*i.e.* increasing safety by preventing rear-end collisions).[17]

Only in a very loose and very general sense does this statement have any accuracy. It definitely ignores some basic and substantial differences between the two systems. For example, a mechanical device cannot place a torpedo on a track which will give an audible alarm signal to a following train; nor can a mechanical signal system in poor visibility situations move itself to a point where it will become visible as can be done by a flagman who can move out of a foggy area to give a more sufficient warning; nor can a signal a far distance away be nearly as effective as a fusee burning on a track at a more advantageous position. Only a flagman on the track can do these things and afford the added protection essential to the safety of the public and railroad employees when a train stops under circumstances where it might be overtaken by another train.

On the other hand block signals can and do perform functions beyond the ability of flagmen. They indicate in the block or blocks ahead, the presence of trains, gaps in the rail caused by slides or washouts, or open switches.

Both mechanical devices and manual flagging may prevent rear-end collisions but they are *not* "similar" methods or systems.

The New Jersey Court indicates that the railroads there asserted that if they believed that the Board's order en-

[17] Pa. P. U. C. Petition Appendix I, page 48.

hanced the safety of rail operations in the slightest degree they would have "no grounds or reasons to oppose the order."

The regulatory bodies in both states found that manual flagging would contribute to safety. It was not "similar". It was something above and beyond the protection afforded by mechanical devices and in no way conflicted with them.

A mechanical failure may and does, in spite of every engineering effort, sometimes give a false proceed signal. When it does so, only extraordinary good fortune, in the absence of flagging, prevents injury or death.

The fact that manual flagging has been imposed or considered by the legislatures or regulatory bodies of at least seven states gives weight to the importance attached to it as a safety measure.[18] Certainly if it performed the "exact same function" as block signals it would not be needed.

The Pennsylvania Supreme Court found that the Interstate Commerce Commission had issued an order requiring flagging.[19]

The Court is referred in this connection to the letter of the Interstate Commerce Commission dated July 12,

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[18] Other than Pennsylvania.
Delaware—Public Service Commission—Docket 440.
Illinois—Public Service Commission Case No. 5097.
West Virginia—West Virginia Public Service Commission Case No. 6024.
New Jersey—See Appendix I hereto.
Maryland—See Brotherhood of Railroad Trainmen v. Baltimore & Ohio R. Co., *et al.*, 248 Md. 530, 238 A. 2d 516.
Kansas—Statute: Protection of trains, engines and cars on main track by flagman. That when any train or trains, engines or cars are obstructing any main-line or other tracks that are being used for main-line purposes they shall be protected against approaching trains at all times regardless of the use of any manual or automatically controlled block system or signal, or any yard limit board, by a reliable and competent flagman with both visible and audible signals. (L. 1913, ch. 251, § 2; March 6; R. S. 1923, 66-245; Kansas Statutes Ann. ch. 66 § 245).

[19] Such order, No. 29543, is printed as Appendix V hereof.

1967[20] which itself construed its own order as not to require flagging but as being permissive only. In short, the order sets up certain procedures for the operation of block systems which include permission to allow passenger trains or opposing trains in a manual block occupied by another train *when* flagging is prescribed.

Similarly, the evidence of record strongly indicates that the railroads themselves did not consider manual flagging as being within the terms of the Block Signal Act. If embraced by the Statute the railroads should have filed their rules relative to flagging with the federal authorities when the Act was passed in 1937,[21] but they did not do so. Nor do they report failures of flag protection as required by Section 25(f). Never has the failure of a flagman to properly perform his duties been reported as a failure under the Block Signal Act.

Paragraph (c) of the Act[22] requires that any change in the rules, standards, and instructions therein provided for must not be made without Commission approval. Yet when the railroads made the modifications to the flagging rule that gave rise to this litigation they did not secure I. C. C. or D. O. T. approval. How can they now argue that they are within and without the Statute at the same time?

The federal government continues to refer to and accept railroad regulations issued by the Pennsylvania Public Utility Commission. In this connection, attention is invited to Railroad Accident Investigation Report No. 4135,[23] The Pennsylvania Railroad Company, October 4, 1967, issued June 28, 1968, by the U. S. Department of Transpor-

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[20] Appendix II to this Petition.

[21] Pa. P. U. C. Petition Appendix III, page 74.

[22] Sec. 25c Pa. P. U. C. Petition Appendix III, page 74.

[23] See Appendix VI hereto.

tation, Federal Railroad Administration, Railroad Safety Board. The case involved a rear-end collision between two Pennsylvania Railroad freight trains near Huntingdon, Pa. on October 4, 1967, resulting in death to one, and injury to two, train-service employees. The Board found that the accident was caused by failure of the conductor and flagman of the preceding train to provide adequate flag protection against following trains, and the failure of the engineer and front brakeman to operate the following train in accordance with signal indications. On page 5 of the report, the Board makes reference to the regulation of the Public Utility Commission here involved[24] and, on page 8, found, *inter alia,* that the preceding train was moving under circumstances in which it could be overtaken by another train and without flag protection as required. There is no indication that the federal authorities found fault with the Pennsylvania regulation and the case is illustrative of the manner in which the block signal system and manual flagging complement each other.

Where the Pennsylvania Superior Court without dissent found no pre-emption; where three dissenting Justices of the Pennsylvania Supreme Court found no pre-emption; where the New Jersey Supreme Court and the Illinois Supreme Court found no pre-emption; where there is no conflict in the federal law and the state law; where other state regulatory bodies have flagging regulations; where the federal authorities have taken no action in conflict with the state regulation and indeed have recognized it; where a finding of pre-emption would create in the important area of public and employee safety a vaccum theretofore occupied by state regulation under its police power; where the history of the federal legislation and interpretation

[24] The operating rule in effect was that required by the Pennsylvania Commission prior to the remand from the Superior Court and the final order.

of the federal act show no intent to pre-empt the field; and where the other factors mentioned in this presentment and in the petition of the Pennsylvania Public Utility Commission do not support a finding of pre-emption; it is obvious that there has been no clear manifestation of Congressional intent to monopolize the field and that the Majority in the Pennsylvania Supreme Court decision has stretched "inference" to a degree which does violence to the Act of Congress by extending it far beyond its clear intent.

## Conclusion

Certiorari should be granted in this case to correct an error of the decision of the Pennsylvania Supreme Court and to assure the highest judicial review in the determination of whether state regulation of flagging protection in the vital interest of the safety of the public and railroad employees is or is not barred by Section 25 of the Interstate Commerce Act. More especially is this so, where the Pennsylvania and New Jersey Supreme Courts have rendered directly opposite decisions.

Wherefore, it is respectfully requested that our Petition for Certiorari be granted and that the matter be set down for plenary consideration of the facts.

Respectfully submitted,

T. P. SHEARER,
1801 Grant Building,
Pittsburgh, Pa. 15219.

G. P. MacDOUGALL,
705 Ring Building,
Washington, D. C. 20036,
*Attorney for Petitioner.*

## Appendix I

SUPREME COURT OF NEW JERSEY

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No. A-52, September Term, 1966.

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In the Matter of the Formal Complaint
of
BROTHERHOOD OF RAILROAD TRAINMEN, BROTHERHOOD OF LOCOMOTIVE ENGINEERS and BROTHERHOOD OF LOCOMOTIVE FIREMEN, etc., Alleging Unwarranted, Unreasonable and Unsafe Conditions, etc.

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THE PENNSYLVANIA RAILROAD COMPANY and PENNSYLVANIA READING SEASHORE LINES,
*Appellants,*

v.

BOARD OF PUBLIC UTILITY COMMISSIONERS, DEPARTMENT OF PUBLIC UTILITIES and BROTHERHOOD OF RAILWAY TRAINMEN, *et al.*,
*Respondents.*

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49 N. J. 174.
229 A. 2d 505

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Argued February 13, 1967. Decided Apr 24 1967.

On appeal from the Board of Public Utility Commissioners.

*Mr. Richard N. Clattenburg* of the Pennsylvania Bar argued the cause for the appellants (*Messrs. O'Mara, Schu-*

*mann, Davis & Hession,* attorneys; *Messrs. Charles E. Mechem* and *William P. Quinn* of the Pennsylvania Bar, on the brief).

*Mr. James M. Davis, Jr.* argued the cause for the respondent Brotherhoods (*Messrs. Powell and Davis,* attorneys).

*Mr. Alan B. Handler,* First Assistant Attorney General, argued the cause for the respondent Board of Public Utility Commissioners (*Mr. Arthur J. Sills,* Attorney General of New Jersey, attorney; *Mr. Avrom J. Gold,* Assistant Attorney General, and *Mr. William Gural,* Deputy Attorney General, of counsel).

The opinion of the Court was delivered by JACOBS, J.

Effective October 18, 1964, the Railroads made rule changes which included the elimination of flagging requirements in automatic block signal territory and in manual block signal territory when absolute block is in effect. Thereafter the Brotherhoods filed a complaint before the Board of Public Utility Commissioners primarily attacking the rule changes as not consistent with reasonable safety. After due hearings, a hearing examiner submitted a report with various recommendations including one that the pre-existing flagging requirements be reinstated. On January 12, 1966, the Board adopted the examiner's recommendations and entered an order which directed, *inter alia,* that the Railroads (a) "restore Rules 99 and 152 to the wording in effect prior to October 18, 1964, insofar as said wording pertains to protection by flagging"; and (e) "maintain headlights on each train in conformity with the applicable regulations of the Interstate Commerce Commission." The Railroads appealed to the Appellate Division and we certified before argument there.

The Railroads have long maintained block systems for regulating train movements so as to space trains properly and avoid collisions. A block is a length of track within defined limits and may be controlled manually or automatically. In the manual block system, permission to enter a block and advise as to whether it is clear is given by an employee, normally by a signal indication at the entrance to the block. In manual absolute block territory (Rule 316), the train is signaled to stop at the entrance of the block containing the preceding train, whereas in manual permissive block territory (Rule 317) it may be permitted to enter the block with speed restriction and warning as to the presence of the preceding train. In automatic block territory, signal indications as to the conditions in each block are given automatically. Electrical circuits in the rails detect the presence of trains and the signals at the entrances to the blocks are governed accordingly. Automatic block signals are so set up as to show the conditions of more than one block ahead. Where the block about to be entered contains a preceding train, the automatic signal is designated as "stop and proceed" which calls upon the engineer to stop and then to proceed with caution at restricted speed not exceeding 15 miles per hour.

In manual block territory, the employee may of course display a false signal which may contribute to a disastrous collision. The possibility of such human error is self-evident and was acknowledged by the Railroads during the hearings before the examiner. Similarly, in automatic block territory, there may be false signals resulting from mechanical or electrical failures and through the malfunction of safety devices. During the hearings, the Railroads introduced evidence as to the high degree of reliability of the automatic signal system. However, they acknowledged

that through the years there have been many failures in the operation of the automatic system but stressed that most of these resulted in more restrictive and therefore non-dangerous signals, rather than in "false-proceed" signals which would dangerously call for less restriction than warranted by the actual conditions. During the hearings, the Pennsylvania Railroad's Engineer, Signals and Catenary, testified that from 1955 to 1964 it reported to the Interstate Commerce Commission, false proceed failures on its entire system which ranged between 3 and 10 in number per annum. During the same period, 6 rear-end accidents occurred in New Jersey and in some of those the absence of flagging was reported as a possible cause.

Prior to October 18, 1964, Rule 99 directed that when a train stops under circumstances in which it may be overtaken by another train, the flagman must go back immediately with flagman's signals, "a sufficient distance to insure full protection," placing torpedoes and, when necessary, lighted fusees. A note stipulated that when operating under automatic block system rules, Rule 99 will have been complied with "when full protection is afforded against trains moving at restricted speed." The October 18th changes provided (1) that when trains are operating under automatic block system rules, "the requirements of Rule 99 do not apply for following movements on the same track," and (2) that when trains are operating under manual block system rules, "the requirements of Rule 99 will not apply for following movements on the same track when Rule 316 is in effect, except when required by train order or timetable instructions."

Several witnesses testified on behalf of the Brotherhoods to the effect that the elimination of the flagman removed an additional safety protection which was reasonably re-

quired. They referred to a relatively recent accident which might have been averted by proper flagging activity, and to various accident investigations which have disclosed rusty tracks and other equipment deficiencies likely to lead to failures in the automatic system. Several witnesses on behalf of the Railroads took the position that the elimination of the flagman would increase rather than decrease safety by placing full rather than divided responsibilty on the engineer. Mr. Rathvon, Manager of Operating Rules of the Pennsylvania, put the matter this way: "I think that by removing the flagman we have removed the temptation for the engineman to rely on still another signal after he had been given a signal that the track is occupied. I believe in this respect we have created a rule that will improve the safety of our operations significantly."

The hearing examiner, in recommending that Rule 99 be restored to its wording prior to October 18th insofar as it applied to protection by flagging, flatly rejected the position of the Railroads on the safety issue, noting that "it is evident that the signal systems both automatic and manual are not perfect, and that any means of maintaining a check on possible errors is desirable." He also rejected the change in Rule 152 which eliminated the flagman requirement in cases where trains crossed over to or obstructed other tracks, pointing out that it would remove any responsibility for protection from the train crew and would place it "solely upon the tower operator, who may be located many miles from the scene." He expressed the view that the elimination of the flagman requirement would be "a reduction in the safety of operation."

In its decision adopting the examiner's recommendations, the Board of Public Utility Commissioners referred not

only to the testimony before him but also to earlier investigations by the Board of railroad accidents which were found by it to have been caused by human, electrical or mechanical failures or by the failure of safety devices to produce expected results. *Cf. The Pennsylvania Railroad Co. v. Dept. of Public Utilities*, 14 *N.J.* 411, 427 (1954). The Board pointed out that consideration must be given "to the use of every reasonable, incremental safety measure available, for this may be the very margin needed to prevent a serious accident." It recognized that the use of flag protection may cause some delay to trains but concluded that the safety aspects of rear-end flagging outweigh that consideration and that through flagging "a human or mechanical failure otherwise of tragic consequence may be overcome." It did not accept the Railroads' contention that the elimination of rear-end flagging was actually a safety improvement but determined instead that the flagging requirements of Rules 99 and 152 should be reinstated as reasonably essential to the safety of the traveling public and railroad personnel.

The Railroads urge that the Board's order restoring the flagging requirements was not supported by substantial evidence in the record and was "an abuse of administrative discretion." The Board is expressly authorized by statute to impose reasonable safety requirements on railroads operating within New Jersey. *R.S.* 48:2-23; *R.S.* 48:2-25; *The Pennsylvania Railroad Co. v. Dept. of Public Utilities, supra*, 14 *N.J.* at 425. *R.S.* 48:2-23 provides that the Board may require any public utility to furnish safe, adequate and proper service; and *R.S.* 48:2-25 provides that it may fix just and reasonable practices to be followed by any public utility. See also *R.S.* 48:2-13; *R.S.* 48:3-3. An order of the Board fixing safety requirements may be reviewed judicially but will not be upset where there was reasonable

basis for its entry. *R.S.* 48:2-46; *In re Greenville Bus Co.*, 17 *N. J.* 131, 137-38 (1954); *Penna-Reading Seashore Lines v. Bd. Pub. Utility Com.*, 13 *N.J. Super.* 540, 548-49 (*App. Div.*), affirmed 8 *N.J.* 85 (1951).

In the *Pennsylvania* case, 14 *N.J.* 411, this Court made observations which have pertinence here. We pointed to the high and continuing public responsibility of the Board to insure that railroads provide safe transportation; we indicated that the Board need not await the happening of an accident before it acts to compel an additional safety measure which it finds to be reasonably necessary for the protection of the public; and we noted that the value of certain precautionary requirements may be self-evident and not require affirmative proof. 14 *N.J.* at 430. Here, the Railroads seem to have placed the primary stress on the contention that the elimination of the flagging requirements would increase rather than decrease the safety of operations. And while several railroad employees expressed their opinions to that effect, they did not produce any significant factual documentations or any independent expert studies in support. It appears highly unlikely that properly trained engineers would lessen their caution or their attentiveness because the block signals were being supplemented by flagging. And it appears highly likely that properly conducted flagging would serve, at least to a degree, as a safety measure against the exceptional failures in both the automatic and manual block territories; indeed the warning potential afforded by suitable flagging, flares and the like, may be said, as in the *Pennsylvania* case (14 *N. J.* at 430), to be self-evident. In any event, the showing before us affords no sound basis for differing with the Board's finding that the flagging requirements had affirmative safety aspects which outweighed the minor costs and inconveniences incident to their reinstatement.

There is no doubt as to the constitutional power of our Legislature to impose reasonable safety requirements on railroads operating in New Jersey, provided there is no substantial interference with interstate commerce or intrusion into a field which Congress has occupied completely. See *The Pennsylvania Railroad Co. v. Dept. of Public Utilities, supra,* 14 *N.J.* at 425; see also *Brotherhood of Locomotive Engineers v. Chicago, Rock Island & Pacific Railroad Co.,* 382 *U.S.* 423, 429, 15 *L.Ed.2d* 501, 505 (1966); *Florida Avocado Growers v. Paul,* 373 *U.S.* 132, 141-43, 10 *L.E.2d* 248, 256-67 (1963). The Railroads, while conceding that the Board's requirements are not in actual conflict with federal statutory or regulatory requirements, contend nonetheless that they are invalid (1) because Congress has "preempted" the field by its passage of Section 25 of the Interstate Commerce Act (49 *U.S.C.A.* § 26) and (2) because they impose "an unlawful burden on Interstate Commerce in violation of the Federal Constitution, Art. 1, Sect. 8."

On the issue of preemption the Railroads rely most heavily on *Napier v. Atlantic Coast Line R. Co.,* 272 *U.S.* 605, 71 *L.Ed.* 432 (1926) where the Supreme Court struck down state requirements for cab curtains and automatic doors to fire boxes, on the ground that the Congressional enactment manifested "the intention to occupy the entire field of regulatory locomotive equipment." 272 *U.S.* at 611, 71 *L.Ed.* at 438; see also *Southern R. Co. v. Railroad Commission,* 236 *U.S.* 439, 446, 59 *L.Ed.* 661, 665 (1915); *Pennsylvania R. Co. v. Public Service Commission,* 250 *U.S.* 566, 569, 63 *L.Ed.* 1142, 1145 (1919). *Napier* has never been applied as broadly as the Railroads contend (*cf. Terminal R. Asso. v. Brotherhood of R. Trainmen,* 318 *U.S.* 1, 4, 87 *L.Ed* 571, 576 (1943); *Southern Pacific Co. v. Arizona,* 325 *U.S.* 761, 766, 89 *L.Ed.* 1915, 1922 (1945)); in any event it dealt,

not with a supplemental local emergency safety device, such as flagging, but with equipment attached to the locomotive which passes through from state to state and with respect to which the national interest in uniformity is vital and paramount. Similarly, the very Congressional language (49 *U.S.C.A.* § 26(b)) points to the block signal systems themselves and to similar appliances where national uniformity is the concern rather than to local safety requirements which do not impair the design or sweep of the federal regulations. . .

In *Florida Avocado Growers v. Paul, supra,* the Supreme Court pointed out that federal regulation of a field in commerce should not be deemed preemptive of state power in the absence of persuasive reason—"either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained. See, e.g., Huron Portland Cement Co. v. Detroit, 362 US 440, 4 Led2d 852, 80 S Ct 813, 78 ALR 2d 1294." 373 *U.S.* at 142, 10 *L.Ed.2d* at 257. And in *Brotherhood of Locomotive Engineers v. Chicago, Rock Island & Pacific Railroad Co., supra,* the Supreme Court, in upholding a state full crew law as against a claim of preemption, noted that in the absence of Congressional legislation as to the number of crew members, "the States have extensive power of their own to regulate in this field, particularly to protect the safety of railroad employees and the public." 382 *U.S.* at 429, 15 *L.Ed.2d* at 505. Indeed, it may be said that state regulatory provisions having local safety as their objective are the least likely to be held preempted. See *Huron Portland Cement Co. v. Detroit,* 362 *U.S.* 440, 442-44, 4 *L.Ed.2d* 852, 855-56 (1960); *cf. Railroad Transfer Service v. Chicago,* ____*U.S.* ____, ____*L.Ed.2d* ____ (1967); see also *The Pennsylvania Railroad Co. v. Dept. of Public Utilities, supra,* where we stated that we were not convinced "that

there is merit to the Pennsylvania's contention that Congress has occupied the field of automatic block signals to the total exclusion of any state safety requirements bearing thereon." 14 *N.J.* at 434.

We reject not only the Railroads' preemption contention but also their claim that the Board's restoration of the flagging requirements constituted an undue burden on interstate commerce. In *Southern Pacific Co. v. Arizona, supra,* the Supreme Court pointed out that much had been left to the states for the regulation of subjects of local state concern and that the significant matters were the "nature and extent of the burden" which the state's safety regulations imposed on interstate commerce, and the "relative weights of the state and national interests." 325 *U.S.* at 771, 89 *L.Ed.* at 1925. Insofar as the flagging requirements here are concerned, it may fairly be said that the local safety interest is great, the need for uniformity is slight, and the burden on interstate commerce is minimal. Indeed at the close of their brief, the Railroads assert that if they believed that the Board's order enhanced the safety of rail operations in the slightest degree they would have "no grounds or reasons to oppose the order." The Board, as the expert administrative body charged by the Legislature with primary responsibility in the field, has found that safety will be enhanced and the record furnishes no persuasive ground for a different judicial finding or a holding of unconstitutionality. See *The Pennsylvania Railroad Co. v. Dept. of Public Utilities, supra,* where, after citing *California v. Thompson,* 313 *U.S.* 109, 113, 85 *L.Ed.* 1219, 1221 (1941) and other pertinent cases, this Court said:

> "Finally, the Pennsylvania contends that the order violates the Commerce Clause of the Federal Constitution. We are satisfied that it does not. The requirements of the order, to the extent sustained, do not substantially impair the free flow of commerce between

> the states or intrude onto any field occupied completely by Congress. They are simply local safety measures which are reasonably designed to protect the traveling public within our State. Their advantages in guarding against accidents appear substantial and their disadvantages, measured in the asserted terms of expense and inconvenience, appear insubstantial. We consider that they fall well within the controlling decisions, listed by Justice Stone in *California v. Thompson, supra,* which have sustained many state safety regulations of comparable nature." 14 *N.J.* at 437.

See also *Huron Portland Cement Co. v. Detroit, supra,* 362 *U.S.* at 443-45, 4 *L.Ed.2d* at 856-57; *Head v. Board of Examiners,* 374 *U.S.* 424, 428, 10 *L.Ed.2d* 983, 987 (1963); *cf. Terminal R. Asso. v. Brotherhood of R. Trainmen, supra,* 318 *U.S.* at 8, 87 *L.Ed.* at 578.

The attack by the Railroads on paragraph (e) of the Board's order involves different considerations than those presented by the reinstatement of the flagging requirements. That paragraph directed that the Railroads maintain headlights on each train in conformity with the applicable regulations of the Interstate Commerce Commission. The headlights are of course part of the railroad equipment which moves through from state to state and the federal commission has prescribed detailed regulations with respect to them. 49 *C.F.R.* § 91.231; see *Brown v. Chicago, R.I. & P. R. Co.,* 108 *F.Supp.* 164 (*N.D. Iowa* 1952). Here uniformity is a matter of prime consideration and there is no suggestion that the State agency could impose different headlight requirements. It has not sought to do so. The position of the Railroads is that the State agency has no power to adopt and enforce its own headlight requirements (even though they coincide with the federal regulations) and thereby burden them with procedures and penalties beyond those imposed by the federal agency. See *R.S.*

48:2-41; *R.S.* 48:2-42. Although earlier decisions may be referred to (*cf. Southern R. Co. v. Railroad Commission, supra,* 236 *U.S.* 439, 59 *L.Ed.* 661; *Charlestown & W. C. R. Co. v. Varnville Furniture Co.,* 237 *U.S.* 597, 59 *L.Ed.* 1137 (1915)), they should be considered in the light of recent reaffirmations of *California v. Zook,* 336 *U.S.* 725, 730, 93 *L.Ed.* 1004, 1010 (1949) where the Court held that "identity does not mean the automatic invalidity of State measures." See *Colorado Com. v. Continental Airlines,* 372 *U.S.* 714, 722, 10 *L.Ed.2d* 84, 90 (1963) where the Supreme Court noted that in order to hold that a "state statute identical in purpose with a federal statute is invalid under the Supremacy Clause, we must be able to conclude that the purpose of the federal statute would to some extent be frustrated by the state statute." See *Florida Avocado Growers v. Paul, supra,* 373 *U.S.* at 142, 10 *L.Ed.2d* at 256.

We are not prepared to say that the Board could not under any circumstances adopt headlight regulations which coincide with the federal regulations, but are nonetheless satisfied that the record before us calls for vacation of paragraph (e) of the order. Though there was some testimony with respect to headlights, there was no suggestion that the Railroads were not willing to remedy quickly any headlight deficiencies called to their attention. There was no substantial evidence that there were actual violations of the federal regulations nor was there any finding of such violations either by the hearing examiner or by the Board itself. Indeed the only comment in the Board's decision was that improved headlights were being installed and that the record contained descriptions of various headlights but "no suggestion as to appropriate standards of construction or degree of brilliance." The Board's brief contains nothing addressed to the defense of the paragraph or by way of answer to the Railroads' attack on it. On the

particular showing before us we find no reasonable need or present occasion for paragraph (e) and it will be exscinded. See 60 *Harv.L.Rev.* 262, 265 (1946). Subject to that modification the Board's order is:

Affirmed.

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## Appendix II

INTERSTATE COMMERCE COMMISSION

OFFICE OF THE GENERAL COUNSEL

Washington, D.C. 20423

July 12, 1967

THE PENNSYLVANIA R. R. CO.
RECEIVED
JUL 14 1967
LEGAL DEPT.
PHILADELPHIA, PA.

Richard N. Clattenburg, Esq.
General Attorney
Pennsylvania Railroad Company
1138 Transportation Center
Six Penn Center Plaza
Philadelphia, Pa. 19104

Dear Mr. Clattenburg:

This is in reply to your letter dated June 27, 1967, in which you refer to my letter of February 20, 1967, to Mr. Louis C. Carter, Esquire, Assistant Counsel of the Pennsylvania Public Utility Commission.

As you state, the Interstate Commerce Commission has never established comprehensive rules prescribing the cir-

cumstances under which flagging shall and shall not be performed. While Order No. 29543 provided for the movement of trains in an occupied block subject to flag protection, this was considered a permissive requirement to allow such movements. The Commission had not construed its action as including flagging as one of the safety appliances, methods, or systems covered by Section 25 of the Interstate Commerce Act.

As you are aware, the safety functions administered by the Interstate Commerce Commission were transferred to the Department of Transportation on April 1 of this year. At the time of the transfer, Order No. 29543 was still in effect. Since this matter is presently under the jurisdiction of the Department of Transportation, I am sending your letter and our file to Mr. A. Scheffer Lang, Federal Railroad Administrator, for his consideration and comments directly to you.

Very truly yours,

ROBERT W. GINNANE,
Robert W. Ginnane,
*General Counsel.*

## Appendix III

DEPARTMENT OF TRANSPORTATION
FEDERAL RAILROAD ADMINISTRATION
WASHINGTON, D. C. 20591

THE PENNSYLVANIA R. R. CO.
RECEIVED
AUG 1 1967
LEGAL DEPT.
PHILADELPHIA, PA.

July 31, 1967

Mr. Richard N. Clattenburg, General Attorney
The Pennsylvania Railroad Company
1138 Transportation Center
Six Penn Center Plaza
Philadelphia, Pa. 19104

Dear Mr. Clattenburg:

This is in connection with your letter of June 27, 1967, to Mr. Robert W. Ginnane, General Counsel for the Interstate Commerce Commission, relating to Order No. 29543 issued by the Commission dated June 17, 1947. Mr. Ginnane has forwarded your letter and his file in this matter to the Federal Railroad Administration, which now has jurisdiction in Order No. 29543, for consideration and comments to be forwarded directly to you.

This order in Docket No. 29543 is presently in effect and is operative.

The manner in which flag protection is provided is an operating matter over which we do not exercise jurisdiction.

Sincerely yours,

(Name illegible), for
H. R. LONGHURST,
Acting Director
Bureau of Railroad Safety

## Appendix IV

### BOILER INSPECTION ACT

§ 23. Use of unsafe locomotives and appurtenances unlawful; inspection and tests

It shall be unlawful for any carrier to use or permit to be used on its line any locomotive unless said locomotive, its boiler, tender, and all parts and appurtenances thereof are in proper condition and safe to operate in the service to which the same are put, that the same may be employed in the active service of such carrier without unnecessary peril to life or limb, and unless said locomotive, its boiler, tender, and all parts and appurtenances thereof have been inspected from time to time in accordance with the provisions of sections 28-30 and 32 of this title and are able to withstand such test or tests as may be prescribed in the rules and regulations hereinafter provided for. Feb. 17, 1911, c. 103, § 2, 36 Stat. 913; Mar. 4, 1915, c. 169, § 1, 38 Stat. 1192; June 7, 1924, c. 355, § 2, 43 Stat. 659.

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## Appendix V

### INTERSTATE COMMERCE COMMISSION ORDER NO. 29543

1. Install on that part or parts of its lines over which any passenger train is operated at a speed of 60 or more miles per hour, or any freight train is operated at a speed of 50 or more miles per hour, an automatic block-signal system which shall conform to the rules, standards, and instructions prescribed by the order of the Commission of April 13, 1939, as herein amended, or a manual block system which shall conform to the following conditions:

A passenger train will not be permitted to the block when occupied by another train, except under flag protection; no train will be admitted to the block when occupied by an opposing train or by a passenger train, except under flag protection; and a train other than a passenger train will not be permitted to follow a train other than a passenger train into the block except when authorized by a train order, permissive signal, or prescribed form, and when such movement is so authorized, the following train must proceed prepared to stop short of a train or obstruction, but not to exceed 15 miles per hour. 268 I. C. C. 560-561; Docket No. 29543.

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## Appendix VI

## DEPARTMENT OF TRANSPORTATION
## FEDERAL RAILROAD ADMINISTRATION
## RAILROAD SAFETY BOARD

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## RAILROAD ACCIDENT INVESTIGATION
## REPORT NO. 4135

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## THE PENNSYLVANIA RAILROAD COMPANY
## OCTOBER 4, 1967

*Synopsis*

On October 4, 1967, a rear-end collision occurred between two Pennsylvania Railroad freight trains near Huntingdon, Pa., resulting in death to one, and injury to two, train-service employees.

The accident was caused by failure of the conductor and flagman of the preceding train to provide adequate flag

protection against following trains and failure of the engineer and front brakeman to operate the following train in accordance with signal indications.

*Location and Method of Operation*

The accident occurred on that part of the Allegheny Division extending between View and Altoona, Pa., a distance of 117.2 miles. In the accident area this is a three-track line over which trains moving with the current of traffic on tracks No. 1 and No. 3, and either direction on track No. 2, operate by signal indications of an automatic block-signal system, supplemented by a cab-signal system. From the south, the main tracks are designated as No. 1 eastward passenger, No. 2 eastward freight, and No. 3 westward.

The collision occurred on track No. 2, 81.3 miles west of View and 2.1 miles east of Huntingdon. Ardenheim, a small community not shown in the timetable, is near the collision point.

An interlocking, designated as Hunt, is at Huntingdon. Semi-automatic signal 10L, is 1.9 miles west of the collision point. It is controlled by the Hunt interlocking operator and is the home interlocking signal for westbound trains approaching the interlocking on track No. 2.

Automatic signals 1981 and 2003, governing westbound movements on track No. 2, are 2.2 miles and 526 feet east of the collision point, respectively. These signals, and signal 10L, are of the position-light type and are mounted on signal bridges.

Details concerning the tracks, signals, carrier's operating rules and timetable special instructions, trains involved, damages and other factors are set forth in the appendix.

The accident occurred under foggy weather conditions, which materially restricted the view of the members of the train crew involved.

*Description and Discussion*

Extra 6314 West, a westbound freight train consisting of 3 diesel-electric units, 104 cars loaded with ore, and a caboose, left Enola Yard at Banks, Pa., 5.7 miles east of View, at 3:59 a. m. the day of the accident. About 30 minutes later, it entered track No. 2 at View and proceeded to the vicinity of Wall, 38.1 miles west of View, where it stopped because of sticking brakes. When the brakes were released, the train again proceeded westward at various speeds under forty miles per hour, passing Jacks, 10.9 miles east of Huntingdon and Hunt interlocking, at 7:12 a. m. It passed signal 1981 about ten minutes later, then approached signal 2003, the approach signal to signal 10L. As the train neared signal 2003, which displayed on Approach aspect, the Hunt interlocking operator radiotelephoned the engineer and advised him to approach signal 10L slowly, as that signal was displaying a Stop aspect due to a route having been lined within the interlocking for Extra 2353 East, an eastbound freight train, to enter track No. 1 via track No. 2. Soon afterward, Extra 6314 West passed signal 2003 and stopped on track No. 2 with the rear end 526 feet west of that signal and the front end 4,965 feet short of signal 10L, which the engineer was unable to see because of the foggy weather conditions. He stopped this distance short of signal 10L because of grade conditions which would facilitate restarting the train later. At 7:32 a. m., within a few minutes after Extra 6314 West stopped, and while it was standing on track No. 2, the rear of the train was struck by Extra 2352 West, 526 feet west of signal 2003 and 2.1 miles east of Huntingdon.

The conductor and flagman of Extra 6314 West were in the cupola of the caboose as their train passed Jacks. They said it was very foggy at this time, and estimated that the fog restricted their range of vision to about 500 or 600 feet. According to their statements, the train proceeded westward from Jacks at 23 or 25 miles per hour and reduced speed to about 15 miles per hour nearing signal 2003. They stated that as the train neared this signal they overheard the radio-telephone conversation between the engineer and the Hunt interlocking operator, but could not understand what was being said and thus were unaware that the train was going to stop short of signal 10L. They further stated that they did not drop any lighted fusees onto the track structure while their train was moving en route from View, or while it was reducing speed in preparation for the stop short of signal 10L. The conductor and flagman descended from the caboose cupola when the train stopped in the block of signal 2003 and short of signal 10L, and at this time Extra 2353 East was passing the caboose on track No. 1. About one minute later, according to his statements, the flagman alighted from the caboose with a red flag, torpedoes and fusees, to provide flag protection against following trains on track No. 2. The conductor said that soon afterward, when Extra 2353 East had passed and the flagman had proceeded about 300 feet to the rear of the caboose, he saw the headlight of Extra 2352 West approaching from the rear on track No. 2 and saw the flagman giving that train stop signals with his red flag. He further said the approaching train was about to pass signal 2003 at this time, and estimated that it was moving at 25 to 30 miles per hour. Realizing that the approaching train could not stop short of a collision, the conductor alighted from the caboose and ran to safety. Although the conductor said the flagman had gone back about 300 feet,

the flagman stated that he had proceeded only 20 feet to the rear of the caboose when he heard the conductor call a warning about the approach of Extra 2352 West. He further stated that he immediately started to give the approaching train stop signals with his red flag, but ceased giving these signals moments later upon realizing they could not be seen through the fog. He then started to light a fusee. Immediately afterward, however, the flagman realized a collision was inevitable and ran from the track structure without lighting the fusee. Moments later, the locomotive of the approaching train passed the point where the flagman left the track structure and struck the rear end of Extra 6314 West.

The front brakeman of Extra 2352 West was killed, and the engineer of that train was injured. The flagman of Extra 6314 West was slightly injured when he slipped and fell while running from the track structure.

The engineer of Extra 2352 West, the only surviving crew member on the locomotive of that train, could not be questioned at the time of the investigation due to his being hospitalized and the extent of his injuries. Representatives of the carrier, however, were permitted a brief interview with him at the hospital a few hours after the collision, and were able to obtain a few statements concerning his actions and observations en route to the collision point. The following two paragraphs are based on the carrier's report of that interview and other information developed during the investigation.

Extra 2352 West, a westbound freight train consisting of 3 diesel-electric units, 122 cars and a caboose, left Enola Yard at Banks at 5:06 a. m., the day of the accident. It entered track No. 2 at View at 5:43 a. m. Sometime later, apparently about 6:25 a. m., it passed Lewis, 9.4 miles west

of Wall, where it began to follow Extra 6314 West at a relatively short distance. In addition, it began to encounter wayside signals displaying Approach aspects, due to the preceding train occupying the blocks of the next signals in advance. As the locomotive passed each wayside signals displaying an Approach aspect, the cab signal in the control compartment displayed a corresponding aspect. The engineer reduced speed to somewhat under 30 miles per hour to comply with these signal aspects, and to avoid the necessity of stopping at a signal still displaying a Stop-and-Proceed aspect due to the preceding train having not yet moved westward out of its block. Thus, as Extra 2352 West proceeded in the block of a signal displaying an Approach aspect, the preceding train moved out of the block of the next signal in advance, resulting in the Stop-and-Proceed aspect displayed by that signal changing to Approach before the signal became visible through the fog to the engineer of Extra 2352.

After passing several wayside signals displaying Approach aspects, Extra 2352 West passed signal 1981, which also displayed an Approach aspect. This indicated to the engineer that signal 2003 was displaying a Stop-and-Proceed aspect, due to the preceding train not yet having moved out of its block. Unaware that the preceding train had stopped in the block of signal 2003, the engineer assumed that it would clear that block while his train was moving in the block of signal 1981 and that the Stop-and-Proceed aspect displayed by signal 2003 would change to Approach before the signal came into view through the fog. Thus, he took no action to reduce speed sufficiently to stop the train short of signal 2003, as required, if that signal displayed a Stop-and-Proceed aspect when it came into view. According to the engineer, the train was moving about 25 miles per hour and was closely approaching signal

2003 before that signal came into view through the fog and he then saw that it was displaying a Stop-and-Proceed aspect, instead of the expected Approach aspect. He and the front brakeman simultaneously saw the caboose of the preceding train standing on track No. 2 a short distance ahead. The engineer applied the train brakes in emergency and a few seconds later, before its speed was materially reduced, Extra 2352 West struck the caboose of the preceding train.

Rule No. 99 provides that when a train stops under circumstances in which it may be overtaken by another train, a member of the crew must go back immediately with flagging equipment a sufficient distance to insure full protection, placing two torpedoes, and when necessary, in addition, displaying lighted fusees. When a train is moving under circumstances in which it may be overtaken by another train, a member of the crew must take such action as may be necessary to insure full protection. By night, or by day where the view is obscured, lighted fusees must be dropped off at proper intervals. A footnote states that this rule is not applicable for following movements on the same track when trains are operating under automatic block-signal system rules as in this case. However, a regulation of the Pennsylvania Utility Commission requires that, in the State of Pennsylvania, flag protection be provided against following trains occupying the same track, by a properly qualified flagman or trainman using standard flagging equipment, for trains moving on main tracks, under circumstances in which such trains may be overtaken by following trains and for trains stopped under circumstances in which they may be overtaken by following trains, in automatic block-signal territories and other specified territories. A footnote to this regulation provides that the requirements of flagging, insofar as protecting against follow-

ing trains is concerned, will have been complied with when full protection is afforded against trains moving at restricted speed.

It is evident that as Extra 6314 West, the preceding train, was proceeding from Jacks to the point where it stopped in the block of signal 2003, it was moving under heavy fog conditions and circumstances in which it could be overtaken by another train, and that neither the conductor nor flagman took any action, as required, to provide protection against following trains. Had either the conductor or flagman dropped lighted fusees onto the track structure, as required under the circumstances, it is probable that Extra 2352 West, the following train, would have stopped to extinguish the fusees and would have then proceeded at reduced speed, prepared to stop short of a train or obstruction. Thus, the accident might have been averted. It is also evident, that full protection was not provided for the preceding train, as required when it stopped in the block of signal 2003 under foggy weather conditions and circumstances in which it could be overtaken by another train. Had the flagman gone back immediately with a lighted fusee as far as possible in the interval between the time his train stopped and the following train was observed to be approaching, the collision might have been averted or its consequences minimized.

Under the carrier's operating rules, when Extra 2352 West, the following train, entered the block of signal 1981, which displayed an Approach aspect, it was authorized to proceed at not exceeding 30 miles per hour prepared to stop at signal 2003. The train was required to stop short of signal 2003, which displayed a Stop-and-Proceed aspect. After stopping, it was authorized to proceed in the block of signal 2003 at restricted speed not exceeding 15 miles per hour prepared to stop short of a train or obstruction.

It is evident that Extra 2352 West was moving at excessive speed, under the prevailing fog conditions, as it proceeded in the block of signal 1981 and neared signal 2003, and that it was not prepared to stop short of signal 2003, as required, when the Stop-and-Proceed aspect displayed by that signal came into view. Thus, when the engineer first saw signal 2003 at a short distance through the fog, there was insufficient braking distance for the train to stop short of that signal or the preceding train, resulting in the collision.

*Findings*

1. While en route to the point where it stopped in the block of signal 2003, the preceding train was moving under circumstances in which it could be overtaken by another train and without flag protection as required.

2. After stopping in the block of signal 2003, the preceding train was not provided with full protection against following trains, as required.

3. Under the Approach aspect displayed by signal 1981, the following train was authorized to proceed in the block of that signal, prepared to stop short of signal 2003.

4. The following train proceeded in the block of signal 1981 at excessive speed under the existing conditions and was not prepared to stop short of signal 2003 as required, when that signal came into view.

5. The following train passed signal 2003, which displayed a Stop-and-Proceed aspect, without stopping as required, resulting in the collision.

*Cause*

This accident was caused by failure of the conductor and flagman of the preceding train to provide adequate flag protection against following trains, and failure of the engineer and front brakemen to operate the following train in accordance with signal indications.

Dated at Washington, D. C., this 28th day of June 1968.

By the Federal Railroad Administration
Railroad Safety Board

Bette E. Holt
Acting Executive Secretary

(SEAL)

(Appendix omitted.)

SUPREME COURT, U. S.

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OCT 16 1968
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1968

Nos. 443 & 638

PENNSYLVANIA PUBLIC UTILITY COMMISSION,
*Petitioner*
v.
BESSEMER AND LAKE ERIE RAILROAD COMPANY, ET AL.

CO-OPERATIVE LEGISLATIVE COMMITTEE, RAILROAD BROTHERHOODS IN THE STATE OF PENNSYLVANIA,
*Petitioner*
v.
BESSEMER AND LAKE ERIE RAILROAD COMPANY, ET AL.

**On Petitions for a Writ of Certiorari to the Supreme Court of Pennsylvania**

## BRIEF FOR RAILWAY LABOR EXECUTIVES' ASSOCIATION AS AMICUS CURIAE

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**On Petitions for a Writ of Certiorari to the Supreme Court of Pennsylvania**

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## BRIEF FOR RAILWAY LABOR EXECUTIVES' ASSOCIATION AS AMICUS CURIAE

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*To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:*

In accordance with Rule 42.1 of the Rules of this Court, the Railway Labor Executives' Association, having the consent of the parties[1], files this brief in support

[1] The written consents of all parties have been lodged with the Clerk of this Court.

of the Petitions filed by the Pennsylvania Public Utility Commission and the Co-Operative Legislative Committee, Railroad Brotherhoods in the State of Pennsylania, for issuance of a writ of certiorari to review the judgment of the Supreme Court of Pennsylvania in the above cause.

## INTEREST OF THE RAILWAY LABOR EXECUTIVES' ASSOCIATION

The interest of this *amicus,* a voluntary association, derives from its status as the central representative body of 23 constituent railway labor organizations and its function, in such capacity, of advancing those interests which all railway labor shares in common. In that context, the Railway Labor Executives' Association has long been concerned with the problem of railroad safety and the development of programs and federal and state legislation and administration designed to reverse the ever increasing adverse safety picture.

## QUESTION PRESENTED

In the view of the Railway Labor Executives' Association, the question presented here is whether the thirty-year-old Signal Inspection Act, which in terms and by administrative practice and interpretation[2] has been devoted solely to establishment of federal standards for mechanical signal devices to avoid train col-

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[2] In addition to the pertinent matter set out in the Petition, the Court's attention is also called to a letter of May 22, 1964 addressed to a member of Congress by the Chairman of the Interstate Commerce Commission asserting ICC's lack of jurisdiction to require flagging procedures in lieu of radio as a means of protection in connection with track construction or maintenance. *Hearings, infra,* fn. 4, at p. 157.

lisions, can now, on the theory of preemption, be construed to nullify long-standing supplementary state regulatory measures for flag protection and related manual devices.

## REASONS FOR GRANTING THE WRIT

### I. STATE RAIL SAFETY REGULATIONS COMPLEMENTING AND COMPATIBLE WITH FEDERAL LAW HAVE BEEN VICTIMIZED BY AN UNREALISTIC MISAPPLICATION OF THE SUPREMACY CLAUSE

To avoid redundancy, the Railway Labor Executives' Association herewith adopts by reference the reasons and arguments for issuance of the writ advanced by the Pennsylvania Public Utility Commission and the Co-Operative Legislative Committee, Railroad Brotherhoods in the State of Pennsylvania. In our view, those petitions amply demonstrate bases for issuance of the writ in that:

(1) The Supreme Court of Pennsylvania construed and applied the doctrine of preemption in a fashion repugnant to the federal constitutional intent so as to unduly restrict the proper exercise of the state's police powers:

(2) The Pennsylvania decision is in conflict with that of the highest court of a sister state[3];

(3) The Pennsylvania decision involves a misapplication of this Court's decisions on the doctrine of preemption; and

(4) That decision will have a major and adverse impact on other state regulatory measures designed to

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[3] *The Pennsylvania Railroad Company and Pennsylvania Reading Seashore Lines* v. *Board of Public Utility Commissioners, Department of Public Utilities and Brotherhood of Railroad Trainmen, et al.*, 49 N.J. 174, 229 A.2d 505 (1967).